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In The

Supreme Court of the United States

October Term, 1963

No. 744

JOHN J. KELLER,

Petitioner,

vs.

STATE OF WISCONSIN ex rel.
STATE BAR OF WISCONSIN,
an association,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE THOMPSON
Attorney General for State of Wisconsin

WARREN H. RESH
Assistant Attorney General

Attorneys for Respondent State of Wisconsin ex rel. State Bar of Wisconsin

State Capitol, Madison, Wisconsin 53702

Of Counsel

JOHN B. McCARTHY
402 W. Wilson Street
Madison, Wisconsin

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The respondent does not agree with the petitioner on the scope of the questions presented and as set forth by petitioner at pages 3 and 4 of his brief.

It is the position of the respondent that only one very narrow question is properly before the court here, stated as follows:

QUESTION PRESENTED

Does the decision of the Wisconsin Supreme Court dated October 25, 1963, 21 Wis. 2d 100, 123 N. W. 2d 905, conflict with the decision of the United States Supreme Court in the case of *Sperry v. Florida, ex rel. Florida Bar* (May 27, 1963) 373 U. S. 379, 83 S. Ct. 1322, 10 L. Ed. 2d 1026?

All questions which could properly be raised here on Petition for Certiorari in this case were presented to the court in the petitioner's prior petition for a writ of certiorari herein and which was disposed of by this cour in its order of June 10, 1963, reported in 374 U. S. 102, 83 S. Ct. 1686, 10 L. Ed. 2d 1026, as follows:

"PER CURIAM.

"The petition for writ of certiorari is granted, the judgment is vacated and the case is remanded to the Supreme Court of Wisconsin for reconsideration in light of Sperry v. Florida ex rel. The Florida Bar, 373 U. S. [379], 83 S. Ct. 1322 [10 L. Ed. 2d 428]."

REASON FOR DENYING THE WRIT

THE DECISION OF THE WISCONSIN SUPREME COURT ON REMAND FROM THIS COURT IS IN COMPLETE ACCORD WITH THE DECISION OF THIS COURT IN FLORIDA ex rel. THE FLORIDA BAR

It is apparent from the decision of the Wisconsin Supreme Court that it gave very careful reconsideration to its prior decision in the light of the *Sperry* decision pursuant to the order of this court in remanding the case.

I.

SPERRY DECISION INVOLVED ONLY PRACTICE BEFORE A FEDERAL AGENCY

In *Sperry* it was held that registration in the patent office did not authorize the general practice of law but sanctioned only those services which are reasonably necessary and incident to the preparation and prosecution of patent application.

> "* * * He does not claim that he has any right otherwise to engage in activities that would be regarded as the practice of law. * * * We granted certiorari, 371 U. S. 875, 83 S. Ct. 148, 9 L. Ed 2d 113, to consider the significant, but narrow, questions thus presented." (p. 1324 of 83 S. Ct.)

It was conceded in *Sperry* that the states generally have the power to regulate the practice of law but that in the exercise of that power they cannot hinder or obstruct the free use of a license granted under an Act of Congress. It was not contended in *Sperry* as it is contended by the petitioner here that a license to practice before a federal administrative agency confers the right to practice before a state administrative agency in a case or proceeding in which interstate commerce may be incidentally involved.

II.

THE ONLY PORTION OF THE ORIGINAL DECREE OF THE WISCONSIN SUPREME COURT WHICH NEEDED MODIFICATION IN THE LIGHT OF SPERRY WAS THE ORDER TO THE TRIAL COURT DIRECTING IT TO ENJOIN PETITIONER "FROM APPEARING AS AN ADVOCATE ASSERTING LEGAL RIGHTS FOR A CLIENT BEFORE PUBLIC TRIBUNALS WHICH POSSESS POWER AND AUTHORITY TO DETERMINE THE RIGHTS OF SUCH CLIENTS ACCORDING TO LAW" (quoted from 16 Wis. 2d 377 at 390)

In *Keller* the action arose out of petitioner's practice before the Public Service Commission of Wisconsin, hereinafter referred to as the P. S. C. The Wisconsin Supreme Court made this clear at p. 384 of 16 Wis. 2d 377, 384, 114 N. W. 2d 796, 799, when it said:

> "Thus we address ourselves to the merits as a question of law raised by undisputed facts. The issue is whether the admitted activities of respondent, as listed in the complaint, constitute the practice of law. Summarized, these activities, which respondent proposes to continue, are: Respondent, admittedly not a member of the Wisconsin bar, has engaged in considerable activity before the Wisconsin public service commission for the past seven years. He has made applications to the P. S. C. in behalf of his clients for authority to conduct trucking operations, handled proceedings on behalf of truckers with respect to such applications, appeared before the P. S. C. on behalf of various truckers and in opposition to the granting of permits to other truckers. In the course of these proceedings respondent has examined witnesses and taken such steps as necessary to make a record upon

which formal action may be taken by the commission adjudicating the rights of the parties."

The petitioner sought to justify his practice because he was licensed by the interstate commerce commission, hereinafter referred to as the I. C. C.

Admittedly the portion of the decree quoted in the heading of this section of the brief was too broad in the light of *Sperry* as would be the reasoning offered in support of that portion of the decree wherein the court said at 16 Wis. 2d 377, 387, 114 N. W. 2d 796, 801:

> "We hold, further, that the alleged lawfulness of respondent to engage in similar activities in other jurisdictions, such as in the state of Indiana or before the interstate commerce commission, is immaterial in the case at bar. Respondent's activities in Wisconsin and his compliance or the lack of it with Wisconsin law are the controlling facts and the law applicable. Foreign bodies can no more authorize persons unlicensed in this state to practice law here than could the public service commission of Wisconsin."

It is respectfully submitted that the foregoing language is amply corrected by the language in the court's present decision wherein it said at 21 Wis. 2d 100 at pp. 102-3, 123 N. W. 2d 905, 907:

> "'It is clear enough that Keller's appearance as a representative of others at hearings of the interstate commerce commission held in Wisconsin and his presentation of their matters at such hearings are authorized by his federal license and are not to be enjoined. The difficulty arises in determining what other activities within Wisconsin would be incident to a representation of clients before the interstate commerce com-

mission, whether the hearings were held in this state or elsewhere. We think that it is clear, following the reasoning of *Sperry*, that Keller is not to be enjoined from preparing in Wisconsin such applications to the interstate commerce commission and similar documents of a type which would, in matters before that commission, be counterparts of pleadings in matters before a court. We think also that when clients consult him in Wisconsin about matters which they would like to have him submit to the interstate commerce commission, he may give them opinions as to the impact upon their matters of the federal law and regulations which would govern the interstate commerce commission in hearing and deciding such matters."

In accordance with this language the Wisconsin Supreme Court modified its previous directions for an injunctional order by stating at p. 104 of its decision in 21 Wis. 2d 100 that the petitioner should not be enjoined from the following activities:

"1. Giving advice and instruction to persons informing them of their rights and obligations as to matters pending before the interstate commerce commission or to be presented to said commission;

"2. Preparing applications and other documents of a procedural nature for use in submitting matters to the interstate commerce commission;

"3. Appearing before said interstate commerce commission at any hearings, formal or informal, even though within this state, and representing persons at such hearings as permitted by said commission;

"4. Holding himself out as qualified to perform the foregoing services in interstate commerce commission matters so long as he does not misrepresent the

scope of his interstate commerce commission license." (123 N. W. 2d 905, 907.)

This clearly places the petitioner on exactly the same footing as *Sperry* so far as his rights under a federal license are concerned.

III.

THE PETITIONER HAS NO CONSTITUTIONAL RIGHT TO PRACTICE BEFORE THE P. S. C. BY VIRTUE OF HIS I. C. C. LICENSE.

The Wisconsin Supreme Court's decision on remand from this court provides in addition to matters hereinbefore discussed the following directive to the trial court:

> "The injunction should, however, include a restraint against respondent's performing any services in a representative capacity with respect to proceedings before the Wisconsin public service commission." 21 Wis. 2d 100, 104, 123 N. W. 2d 905, 907.

There is, of course, nothing whatsoever in *Sperry* which states or even hints that the holder of a license to practice before a federal agency has the right to also practice before a state administrative agency by virtue of his federal license.

The scope of an I. C. C. practitioner's authority is set forth in petitioner's brief here on petition for writ of certiorari at pp. 12-13 where reference is made to the federal statute authorizing the I. C. C. to promulgate reasonable rules and regulations relating "to practice before *it*." (Emphasis added.)

See 49 U. S. C. Sec. 17 (12) and Rule 8 of the commission's practice rules which states:

> "The following classes of persons whom the Commission finds, upon consideration of their application, to be of good moral character and possess the requisite qualifications to represent others may be admitted to practice *before the Commission*: (a) Attorneys-at-law —(b) PERSONS NOT ATTORNEYS—any person not an attorney-at-law who is a citizen or resident of the United States and who shall satisfy the Commission that he is possessed of the necessary legal and technical qualifications to enable him to render valuable services *before the Commission* and that he is otherwise competent to advise and assist in the presentation of matters *before the Commission*." (Emphasis added.)

Thus it is to be noted that the sole scope of the federal regulation covers practice *before the I. C. C.* and not before the P. S. C. of Wisconsin or any other agency or court.

Perhaps in closing it might be well to point out a fundamental distinction between the *Sperry* and *Keller* cases.

Sperry so far as material here dealt with a matter over which Congress has exclusive control and has pre-empted the field, the issuance of patents. On the other hand Congress does not have exclusive control over all commerce, interstate and intrastate, and there is nothing whatsoever in *Sperry* which indicates in any way that a state may not in the exercise of its police power set up a state regulatory commission such as the P. S. C. and regulate practice before it either by legislation or through the inherent and supervisory control of the Wisconsin Supreme Court over the practice of law as set forth in the original Wisconsin Su-

preme Court decision herein, 16 Wis. 2d 377, 114 N. W. 2d 796.

CONCLUSION

We have purposely limited this brief to the directive of the United States Supreme Court on remand, namely, reconsideration of the original decision in the light of *Sperry*.

The right of a state supreme court to regulate the practice of law if such regulation does not hinder or obstruct the free use of a license granted under an Act of Congress was conceded in *Sperry*, and we do not consider or understand the mandate of this court to go beyond a direction to the Wisconsin Supreme Court to review its own decision in the light of the *Sperry* case for the purpose of correcting any language or order of the Wisconsin court which might impinge upon petitioner's rights under his I. C. C. license.

State control over the practice of law has been thoroughly canvassed by this court in an earlier case from Wisconsin, *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N. W. 2d 404, 367 U. S. 820, 81 S. Ct. 1826, rehearing denied October 9, 1961, 82 S. Ct. 23. There is no point in attempting now to reargue the constitutional right of the states to define and regulate the practice of law. The only point presently involved is whether a license to practice before a federal agency also authorizes the licensee to practice before state administrative agencies. If petitioner is right in his contentions here as to the scope of his I. C. C. license, it would follow that he could no more be precluded from

practicing before a state court than he could be precluded from practicing before a state administrative agency.

The Wisconsin Supreme Court has faithfully and fully complied with the mandate of this court.

The petition for a Writ of Certiorari herein should be denied.

Respectfully submitted,

GEORGE THOMPSON
Attorney General for State of Wisconsin

WARREN H. RESH
Assistant Attorney General

Attorneys for Respondent State of Wisconsin ex rel. State Bar of Wisconsin

State Capitol, Madison, Wisconsin 53702

Of Counsel

JOHN B. McCARTHY
402 W. Wilson Street
Madison, Wisconsin